83-1104

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF NEWARK,

Petitioner,

v.

TOWNSHIP OF WEST MILFORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Question Presented

Whether the State must provide a monetary remedy to a landowner whose property has been "taken" by a regulatory ordinance which violates the Just Compensation Clause of the Fifth Amendment.

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28 U.S.C.:

Sec. 1257(3) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Opinions Below

On October 7, 1983, the New Jersey Supreme Court entered an Order denying the application for a Petition for Certification filed by the petitioner herein and dismissing its appeal. The New Jersey Supreme Court Order is set forth in the Appendix at 1a.

The opinion of the Superior Court, Appellate Division, was issued on April 28, 1983, and is set forth in Appendix B at 3a.

Two earlier opinions of the Superior Court, Law Division, dated February 19, 1981 and March 31, 1980 are set forth in Appendix C and D respectively at 9a and 13a.

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division was entered on April 28, 1983 affirming the Trial Court's opinion that there had been no taking of petitioner's property "without just compensation" as proscribed by the United States Constitution. Thereafter, on October 7, 1983, the New Jersey Supreme Court denied a petition for certification and dismissed the petitioner's appeal. This Petition for Certiorari was filed within ninety days of the final order of the New Jersey Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statement of the Case

The City of Newark, New Jersey's largest city, owns approximately 18,000 acres of land in the Township of West Milford, a sprawling municipality located approximately 25 miles from Newark and within the New York metropolitan area.

In 1978, after its plans for development on a small portion of its West Milford lands were stymied by West Milford's zoning ordinance, Newark filed suit in the New Jersey Superior Court. The Complaint set forth a factual pattern of exclusionary zoning in violation of the New Jersey Supreme Court holding in *South Burlington County N.A.A.C.P.* v. *Township of Mt. Laurel*, 67 N.J. 151, 336 A2d. 713 (1975) and of a constitutional taking "with-

out just compensation" in violation of both the United States and State constitutions.

In support of its claims, Newark demonstrated that virtually all of its property was placed in an R-4 zone with a minimum lot size of one unit to every four acres of land. Relying on the testimony of the defendant's own officials, Newark proved and the Trial Court found that the intent of this ordinance was to prevent the development of Newark's land for housing purposes (21a) and to preclude its economic use (22a).

The practical effect of this intentional policy of preventing all economically feasible uses was also clear. Using a hypergeometric model to evaluate the likelihood of the property owner making economically feasible use of its land in the R-4 zone, Newark's expert provided undisputed testimony demonstrating that the R-4 zoning precluded any viable use of any significant portion of Newark's acres during the next 25 or even 50 years. (Transcript, August 21, 1979, p. 111). The Trial Court's liability phase decision accepted the plaintiff's proof and concluded that the intent and effect of the four acre (R-4) zone was to keep all the Newark lands vacant and that this zoning precluded economic use of the property. (22a) As a result, the ordinance was invalidated and further proceedings were ordered in regard to fashioning an appropriate remedy. Damages, however, were denied.

While this matter was pending before the Appellate Division of Superior Court, the New Jersey Supreme Court revised and clarified the nature of the claim for "exclusionary" zoning under the New Jersey constitution, *So. Burlington Cty. N.A.A.C.P.* v. *Mt. Laurel Tp.*, 92 N.J. 158, 456 A2d. 390 (1983). Because of the change in the governing law on that issue, the Appellate Division reversed and remanded the matter to the Trial Court for

a new trial consistent with the revised Mt. Laurel doctrine. But the Court's opinion went on to hold that in spite of the intent and effect of the ordinance, the defendant's actions were no more than a non-compensable exercise of the police power rather than a "taking without just compensation" and thus there was no violation of the United States Constitution, Amendment V (6a).

A petition for certification, asking the New Jersey Supreme Court to review the Appellate Division decision in regard to the "Taking without Just Compensation" issue was denied by the New Jersey Supreme Court.

Reasons for Granting the Writ

Since *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), it has been clear that while the United States Constitution permits property to be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. The question of whether the sole remedy for such police power "takings" is mere invalidation of the regulation leaving the property owner without the just compensation guaranteed by the Fifth Amendment remains unresolved.

On several occasions in recent years, this Court has considered but then not decided this issue. First in *Agins* v. *City of Tiburon,* 447 U.S. 255, 263 (1980), and then in *San Diego Gas & Electric Co.* v. *San Diego,* 450 U.S. 621 (1981), the Court was asked to decide whether a payment was required to remedy the loss to a property owner whose land was taken by a regulatory ordinance allegedly justified by the exercise of local police powers. Because this Court did not believe there was a taking in *Agins, supra,* or jurisdiction in *San Diego Gas & Electric Co. supra,* it declined to address this critical issue. This case

presents a further opportunity to address this increasingly important problem and clarify finally that public entities may not zone land out of utility and expect only one taxpayer to pay for it.

The City of Newark owns approximately 18,000 acres in West Milford. Like all other lands in the suburban municipality, the Newark acreage drains into reservoirs that provide water to Newark and neighboring municipalities. But unlike all other lands in West Milford, the Newark owned and taxed lands have remained entirely vacant while its neighbors have converted West Milford into one of New Jersey's fastest growing municipalities.

As West Milford's population has grown, so has the demand for local services and the taxes necessary to provide these services. Faced with an inability to continue to pay increasing taxes for entirely vacant land, Newark sought permission from the defendant to utilize a small portion of its lands for environmentally sensitive development. West Milford's response was to place every Newark owned acre without exception and without regard to its suitability for development in a four acre residential zone.

Although the Trial Court recognized the intent and effect of the ordinance, neither it nor the Appellate Division was prepared to order any meaningful remedy for this confiscation of plaintiff's right to make economically feasible use of its property.

As a practical matter, the defendant's zoning ordinance requires plaintiff to pay vast amounts of taxes while leaving its substantial holdings entirely vacant. While all of the defendant's citizens enjoy the benefits of this "park" only one pays for it. And while one has been told it cannot build in a drainage basin, other landowners develop at will with municipal approval.

In his dissenting opinion in *San Diego Gas & Electric Co., supra,* Justice Brennan suggests that the United States Constitution requires government entities to pay just compensation for the period commencing on the date a regulation first effects a taking and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

We urge the Court to grant this petition so as to adopt precisely that constitutional rule.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Order of the Supreme Court of New Jersey, Denying Petition for Certification

(Filed—October 7, 1983)

SUPREME COURT OF NEW JERSEY
C-189 SEPTEMBER TERM 1983

21,309

CITY OF NEW YORK,

Plaintiff-Petitioner,

vs.

TOWNSHIP OF WEST MILFORD,

Defendant-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3420-80T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to *R.* 2:12-9.

Appendix A

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 4th day of October, 1983.

STEPHEN W. TOWNSEND
Clerk

APPENDIX B

***Per Curiam Opinion* of the Superior Court of New Jersey, Appellate Division, dated April 28, 1983**

(Filed—April 28, 1983)

SUPERIOR COURT OF NEW JERSEY
Appellate Division

A-3240-80 T2

CITY OF NEWARK,

Plaintiff-Appellant
and Cross-Respondent,

v.

TOWNSHIP OF WEST MILFORD,

Defendant-Respondent
and Cross-Appellant.

Argued January 4, 1983. Decided April 28, 1983.

Before Judges Michels, Pressler and Trautwein.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County.

Appendix B

Arnold K. Mytelka argued the cause for appellant and cross-respondent City of Newark (Philip S. Elberg, attorney; Clapp & Eisenberg, of counsel; Mr. Mytelka, on the brief).

Martin F. Murphy argued the cause for respondent and cross-appellant Township of West Milford (Johnson, Johnson & Murphy, attorneys; Mr. Murphy, of counsel and on the brief).

William M. Cox argued the cause for *amicus curiae* Pequannock Watershed Coalition (Dolan and Dolan, attorneys; Mr. Cox, of counsel and on the brief).

Per Curiam.

Plaintiff City of Newark (Newark) instituted this action by a complaint in lieu of prerogative writs, in which it challenged the validity of the zoning ordinance of defendant Township of West Milford (West Milford). Newark claimed that the West Milford ordinance (1) was unconstitutional exclusionary zoning and violated the principles enunciated by our Supreme Court in *So. Burl. Cty. N.A.A.C.P.* v. *Tp. of Mt. Laurel*, 67 N.J. 151 (1975), appa dism. and *cert.* den. 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed. 2d 28 (1975) (*Mount Laurel I*) and (2) was arbitrary, discriminatory and confiscatory as applied to its land. Newark sought injunctive relief permitting it to develop its land in accordance with its proposed development plan, an order directing West Milford to issue the permits necessary to implement that plan and damages.

Newark owns approximately 18,000 acres of undeveloped woodland situated in West Milford. This land has been used exclusively for almost a century as a watershed for the collection and storage of potable water. In 1976

Appendix B

Newark adopted a conservation and development plan for the watershed land, pursuant to which it proposed to develop over a 30 year period approximately 10 per cent of its land for high density residential, commercial, light industrial and recreational uses. In 1978 West Milford refused to amend its zoning ordinance to permit the proposed development, and this action was instituted.

The challenge to the validity of the zoning ordinance was tried first. At the conclusion of the proofs, the trial court, applying the principles enunciated in *Mount Laurel I*, found that "West Milford is a developing municipality" and that its ordinance "was adopted to prevent the development of Newark's land for housing purposes and as a corollary, [t]o exclude low or moderate income housing." The trial court declared the ordinance invalid because West Milford did not provide for its fair share of the regional need for low and moderate income or least cost housing. The trial court directed, however, that the ordinance continue in force pending completion of the trial on the issue of the nature of the relief, if any, to which Newark was entitled. At the conclusion of the proofs on this issue the trial court denied Newark's request for injunctive relief and damages. However, it ordered West Milford to revise its zoning ordinance within 90 days to provide for low and moderate income and least cost housing, and retained jurisdiction to enforce the provisions of the judgment.* Newark appealed and West Milford cross-appealed.

---

* According to a letter dated March 15, 1983 from Kenneth Ochab, Planning Director of West Milford, furnished to us by counsel, West Milford has rezoned in accordance with the judgment of the trial court to provide 994 acres in the Planned Neighborhood zone, 248 acres in the Mobile Home zone and 1738 acres in the Commercial Recreation zone.

Appendix B

While this appeal was pending, the Supreme Court reaffirmed its commitment to the *Mount Laurel I* doctrine, clarified its original decision and set more definitive and workable standards and guidelines for its application. *So. Burlington Cty. N.A.A.C.P.* v. *Mount Laurel Tp.*, 92 N.J. 158 (1983) (*Mount Laurel II*). *Mount Laurel II* implicates substantially all of the issues raised in this matter with the exception of those relating to Newark's claim for monetary damages. Because of this change in the governing law, the judgments under review, with the limited exception of the denial of Newark's claim for monetary damages, are reversed and the matter is remanded to the trial court for a new trial.

With respect to that portion of the judgment entered in favor of West Milford denying Newark's claim for monetary damages, we are satisfied to affirm the same substantially for the reasons expressed by Judge Rubin in his letter opinion of February 19, 1981.

We are convinced that there has been no taking "without just compensation" as proscribed by U.S.Const., Amend. V and N.J.Const. (1947), Art. I, par. 20. See *Cappture Realty Corp.* v. *Bd. of Adj. Elmwood Pk.*, 126 N.J.Super. 200, 216 (Law Div. 1973), aff'd 133 N.J.Super. 216 (App. Div. 1975). Rather, "there has been a non-compensable governmental exercise of the police power." *Washington Market Enterprises* v. *Trenton*, 68 N.J. 107, 116 (1975); *Usdin* v. *Environmental Protection Dep't of N.J.*, 173 N.J.Super. 311, 322 (Law Div. 1980), aff'd o.b. 179 N.J. Super. 113 (App. Div. 1981). See also *Sands Point Harbor, Inc.* v. *Sullivan*, 136 N.J. Super. 436, 440-441 (App. Div. 1975); *Ronade Associates, Inc.* v. *Dept. Conservation, etc.*, 7 N.J.Super. 132, 139-140 (App. Div. 1950).

Appendix B

We are also convinced that the trial court correctly held Newark's claim for damages to be barred by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* Under N.J.S.A. 59:2-3b of that Act "A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." More directly, under N.J.S.A. 59:2-4, "A public entity is not liable for any injury caused by adopting or failing to adopt a law or by failing to enforce any law." The Act applies only to the right to obtain damages. N.J.S.A. 59:1-4. These sections of the Act were applied to dismiss an allegation of "taking" against a municipality in *Woodsum* v. *Pemberton Tp.*, 172 N.J. Super. 489, 518-520 (Law Div. 1980), aff'd 177 N.J.Super. 639 (App. Div. 1981), and to shield a municipality's denial of a zoning variance in *Centennial Land & Dev. Co.* v. *Tp. of Medford,* 165 N.J.Super. 220, *passim* (Law Div. 1979).

The general principle that underlies this Act was stated recently by our Supreme Court, and seems clearly to encompass the type of decision at issue here:

> These subparagraphs are signposts to understanding the nature of immunized discretionary determinations. They suggest that the "exercise of . . . discretion" in N.J.S.A. 59:2-3(a) refers to actual, high-level policymaking decisions involving the balancing of competing considerations. Such decisions have been traditionally entrusted to coordinate branches of government, and courts, utilizing standard tort principles, all ill-equipped to interfere with them. [*Costa* v. *Josey,* 83 N.J. 49, 55 1980)].

Appendix B

Accordingly, except to affirm that portion of the judgment denying Newark's claim for monetary damages, we reverse the judgment under review and remand the matter to the trial court for a new trial consistent with the principles set forth in *Mount Laurel II*. We do not retain jurisdiction.

APPENDIX C

Letter Opinion of Rubin, J.S.C., dated February 19, 1981

SUPERIOR COURT OF NEW JERSEY

IRVING I. RUBIN
Judge

Court House
Paterson, New Jersey

February 19, 1981

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Re: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

Gentlemen:

This matter was before the Court pursuant to the Pretrial Orders of June 14, 1979 and July 30, 1980 and the judgment entered May 15, 1980, on the issues of the type of relief and damages, if any, to be awarded plaintiff.

The relief to be awarded in similar situations has received attention by our courts. In *Southern Burlington v. Mt. Laurel*, 67 N.J. 151, 191-192, the municipality was

granted the opportunity to correct its ordinance which the court found invalid. Although *Oakwood* v. *Madison*, 72 N.J. 481, decreed specific relief for the plaintiff (p. 549-550), such action appeared limited to the facts of that case, the court saying in a footnote (p.551-552):

> "This determination is not to be taken as a precedent for an automatic right to a permit on the part of any builder-plaintiff who is successful in having a zoning ordinance declared unconstitutional. Such relief will ordinarily be rare, and will generally rest in the discretion of the court, to be exercised in the light of all attendant circumstances."

The foregoing caveat was reaffirmed in *Pascack* v. *Washington Tp.*, 74 N. J. 470, 485, 487-488, which principle was followed by *Home Builders* v. *Berlin*, 157 N. J. Super. 586, 602, where the court said, "- - - A court does not enact ordinances; local legislatures do. - - -"

It should also be noted, Item 9 of the pretrial order of July 30, 1980 stated, "- - - the plaintiff in this litigation is not seeking any building permits, - - -".

Accordingly, judgment shall be entered on the issue of relief:

(1) Ordering West Milford to revise its Zoning Ordinance (Land Development Ordinance) within 90 days from the date of the judgment herein, to provide for low and moderate income and least cost housing consistent with the opinions and judgments herein;

(2) the court will retain jurisdiction upon proper application to enforce the provisions of the judgments entered in the matter;

(3) the present zoning ordinance shall be continued in full force and effect until the effective date of such new superceding ordinance or the further order of the court.

As to the Damages Issue

Plaintiff demands damages resulting, it alleges from the placing of its property set forth in the complaint, in the R-4 district.

The Ordinance (P-1) adopted January 25, 1979, while requiring four acres for a dwelling (held invalid by the court's judgment of 5/15/80 allowed other uses in such zone.

As said in *Usdin* v. *Environmental Protection*, 173 N.J. Super. 311 at 321:

> "Compensation was not required by a municipal zoning provision even though it deprived the owner of the property's most beneficial use * * *".

In *Agins* v. *City of Tiburon*, 65 L. Ed. 2nd 106, it was held that restrictions placed on property by way of zoning and similar plans which deprived the property of its most beneficial use were not per se deemed a taking or a basis for a claim of inverse condemnation.

Zoning laws have been described as the classic example of permissible governmental action even when prohibiting the most beneficial use of property. Annotation, 57 L. Ed. 2nd 1254, 1262; *Penn Central* v. *City of New York*, 438 U.S. 104. And, as indicated in *In Review of Health Care* v. *Finley*, 168 N.J. Super. 152, 164, the type of loss suffered under the within facts would not be recoverable.

Appendix C

Plaintiff urges *Lomarch* v. *Englewood*, 51 N.J. 108 and and *Washington Market* v. *Trenton*, 68 N.J. 107 as authority for granting it damages. Both are inapplicable. In *Lomarch*, the temporary taking was, in effect, to prohibit any use of the property. In the present case the defendant did not deprive plaintiff of all beneficial use of the property which was not income producing, all making the within matter distinguishable to the situation in *Washington Market*. See *Schnack* v. *State*, 160 N.J. 343, 348-349.

It would further appear that immunity both under common law and the provisions of the New Jersey Tort Claims Act bars plaintiff. N.J.S.A. 59:2-3b; *Woodsum* v. *Tp. of Pemberton*, 172 N.J. Super. 489. See also *Centennial Land* v. *Tp. of Medford*, 165 N.J. Super. 220; *Expo* v. *City of Passaic*, 149 N.J. Super. 416, 424-425.

A form of judgment should be submitted embodying the foregoing determinations.

Very truly yours,

IRVING I. RUBIN, J.S.C.

IIR:mf

APPENDIX D

Letter Opinion of Rubin, J.S.C., dated March 31, 1980

SUPERIOR COURT OF NEW JERSEY

IRVING I. RUBIN
Judge

Court House
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March 31, 1980

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Re: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

Gentlemen:

Plaintiff, owner of approximately 1800 acres of land in the Tp. of West Milford, by these proceedings seeks to void defendant's zoning ordinance, which in effect, requires four acres of such property for a one family unit. This is claimed to be contrary to *So. Burl. Cty. N.A.A.C.P.* v. *Tp. of Mt. Laurel*, 67 N.J. 151 (1975) (hereinafter referred to as *Mt. Laurel*) and as further provided in *Oakwood at Madison Inc.* v. *Tp. of Madison*, 72 N.J. 481 (1977) (hereinafter referred to as *Oakwood*).

Appendix D

Plaintiff also asserts that the ordinance is arbitrary, discriminatory and confiscatory. It further demands specific relief and damages. At pretrial, it was provided that the issues other than the type of relief and damages be tried first. Accordingly, we must now address the attack on the validity of the ordinance.

The position of plaintiff is that defendant is a developing community and as such must make realistically possible an appropriate variety and choice of housing. *Mt. Laurel*, 174, 179 or least cost housing, *Oakwood*, 512.

The preliminary question was squarely raised, is West Milford a developing community?

Mt. Laurel is said to have laid down the test which was paraphrased in *Glenview Development Co.* v. *Franklin Tp.*, 164 N.J.Super. 563, 567 (Law Div. 1978) as follows:

> • • • A developing municipality:
>
> (1) has a sizable land area,
>
> (2) lies outside the central cities and older built-up suburbs,
>
> (3) has substantially shed rural characteristics,
>
> (4) has undergone great population increase since World War II or is now in the process of doing so,
>
> (5) is not completely developed and
>
> (6) is in the path of inevitable future residential, commercial and industrial demand and growth.

The testimony reveals that West Milford covers an area of approximately 78.3 miles (10th largest municipality in

the State), three times larger than *Mt. Laurel* and situated about 15-16 miles from the City of Paterson and approximately 21 miles from the City of Newark. Although West Milford meets the express language of criteria number two above, it would comply with the meaning ascribed by defendant's witness of being in close proximity. *Glenview Development Co.* v. *Franklin Tp.* supra at 570.

West Milford's population grew from 3,650 in 1950 to 8,157 in 1960 (124%) to 17,304 in 1970 (112%) to 21,743 in 1975 (26%) which was in excess of *Mt. Laurel's* growth which increased in lesser percentages from 2,817 in 1950 to 15,451 in 1975. West Milford's increase in population was far in excess of the remainder of Passaic County and projected to a figure of 47,995 in 1990. (Exhibit P-2).

The statistics further disclosed that 89% of West Milford was vacant land with a population density in 1975 of 277 persons per square mile. The presence of one or more shopping centers, professional buildings, a movie theatre, financial institutions and the extent of municipal services offered by the community including six elementary schools, two parochial schools, a high school complex, police station and municipal building and an economic development committee actively seeking growth (Exhibit P-4) gave additional weight for the Court's determination that West Milford had substantially shed its rural characteristics. One of the experts, Alan Mallach, summed it up when he said; (T. 8/8/79 p.2.49)

> • • • Yes sir. To predict future growth, of course, is always done without perfect certainty, but if there's any community that appears to be well suited for future growth, particularly population growth with commercial and industrial growth as well in

> the New York Metropolitan area during the coming decades, that could well be West Milford Township.

The foregoing and other factors which were included in the testimony would confirm the opinion of plaintiff's experts establishing that West Milford was a developing community.

Therefore, as said in *Mt. Laurel* p. 179, 180;

> * * * the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.
>
> * * *
>
> * * * Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action.

and on p. 187;

> * * * It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like to meet the full panoply of these needs.

By its zoning ordinance, West Milford has created residential zones requiring generally, one, two, three or four acres for a single family dwelling denoted as R-1, R-2, R-3 and R-4 respectively. It appears that with central sewer and water (not presently existent) and meeting conditions imposed by the ordinance, the minimum size lot requires at least 11,000 square feet or 7500 square feet in the R-1 zone but limited to 3.1 lots per acre. (Mallach T. 8/8/79 p. 2.70). The witness Coppola calculated the limitation as up to 3.6 units per acre. (T. 10/23/79 p. 32). The overall density provision would work out to require a plot of 14,000—15,000 square feet. (T. 8/8/79 p. 2.75).

The provisions of the ordinance will not produce least cost housing. (T. 8/8/79 pp. 2.71, 2.73).

The foregoing was not considered favorably in *Oakwood* p. 505, quoting Justice Hall in *Mt. Laurel;*

> * * * minimum size lots of 9,375 to 20,000 square feet "cannot be called small lots and amounts to low density zoning."

and as said in *Oakwood* p. 516;

> * * * Clearly no effort was made to permit "least cost" single family homes—and certainly not in reasonable numbers.

Appendix D

Approximately 1% of West Milford was zoned for PN uses. (T. 10/23/79 p. 35). Provisions for housing in this zone are so circumscribed by conditions, including a 50 acre area, parking provisions and no lookalike as to be cost exacting and proscribe low cost housing. None of the residential zones are available for least cost housing or as a corollary, low or moderate income housing. (T. 8/8/79 p. 2.71);

> • • • Q. (at 18) Are these factors enough, Mr. Mallach, to make it impossible to produce least cost housing?
> A. Yes.

The ordinance excludes mobile homes and garden apartments which is further evidence of failure by a developing community to provide least cost housing. *Mt. Laurel* p. 181; *So. Burl. Cty.* v. *Tp. of Mount Laurel,* 161 N.J. Super. 317, 359 (Law Div. 1978).

The proofs having established the need for housing in the region, West Milford did not sustain its burden of proof as laid down in *Mt. Laurel.*

West Milford pleads in effect a special defense to its obligation as a developing community; i.e. ecological and environmental considerations. However, as was said in *Oakwood* p. 544:

> • • • Ecological and environmental considerations were also advanced by the municipality in *Mount Laurel* to justify large lot zoning throughout the township. We pointed out there that while such factors and problems were always to be given consideration in zoning, the danger and impact must be substantial and very real (the construction of

> every plot has some environmental impact)—not simply a make-weight to support exclusionary housing measures or preclude growth * * *

The reference to *Mt. Laurel* would include statements appearing on pages 186 and 187. As suggested in *Oakwood* p. 544, the answer may not be prohibition or regulation of the density of development per se, but careful use of the land, with adequate controls.

West Milford based such argument on a number of expert witnesses who introduced a variety of exhibits, all tending to give weight to the proposition that construction of every building has some environmental impact and potential for pollution. But to limit housing to large lots simply because a problem exists has not been approved by our courts. *Mt. Laurel* pp. 186, 187.

Other than stressing the wisdom of not building within 1000 feet of a water supply, nothing concrete or conclusive was submitted as to destruction or erosion of existing water facilities because of use for housing purposes. The witness Simmons, (T. 10/31/79) enunciating the theory, affirmed by other witnesses, that the greater the development, the greater the effect of pollutants on a water supply, did advocate a 500 foot distance for development from any water supply as an environmental protection. The other experts generally repeated such theory except that most espoused a buffer area of 1000 feet. Plaintiff's expert categorically stated that "dwellings can be constructed without endangering the water supply."

A consideration of all the testimony did not establish any facts from the ecological or environmental viewpoint sufficient to bar West Milford's obligation as a developing community.

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The testimony established the intent of the adoption of the R-4 zone was to keep the land vacant and prevent the utilization thereof. Every acre owned by plaintiff was placed in the R-4 zone with ownership appearing as the sole test. That appears from the testimony of West Milford's Director of Planning, Kenneth Nelson, who testified plaintiff's lands had been zoned on the basis of Newark's ownership without regard to suitability, location or other factors. See testimony of West Milford's Director of Planning, Kenneth Nelson, (T. 8/16/79 p. 8:54-3);

> • • • Mr. Elberg: Q. Is it then safe to say that the Planning Board proposed that all of the Newark land be zoned on the basis of ownership, that is, that all the residential areas would be included in the R-4 zone, because they were owned by Newark?
>
> A: Yes. But I want to make clear the chronology of the events here. When the Master Plan was adopted, the majority of the Newark acreage was put in the R-4 district, pending the further study that was ultimately conducted by Mr. Coppola, and subsequent to that study, yes the Planning Board and Council put all the Newark acreage in the R-4 district on the basis of ownership.

Further, T. 8/16/79 p. 8.62;

> • • • Q: As a result of discussions with the experts retained in this litigation, was a decision made to place all of the Newark land in an R-4 zone?
> A: That was the decision of the council.

Also T. 10/16/79 p. 136;

> • • • Q: And the ones owned by the City of Newark are zoned R-4, is that correct?

A: Yes.
Q: And the other properties immediately adjacent thereto are zoned R-2; is that correct?
A: R-2 or 3, yes.

T. 10/16/79, p. 136 at 25;

• • • Q: Now, is there anything different that you know of, or any considerations for zoning those properties differently, Mr. Nelson?
A: Well, relying on my general knowledge and on Mr. Abeles' comments, which I believe used the words virtually identical, I would have to say that the distinction there between the two properties in terms of the zoning was attributable to the Township policy about limiting the use of watershed property to water supply purposes.

T. 10/16/79, p. 155 at 18;

• • • Q: Are all of the City of Newark's lands zoned R-4?
A: Yes.

To the same effect, testimony of John Terry, Township Manager and Arthur Mildner (former Mayor).

From the foregoing it must be concluded that the ordinance was adopted to prevent the development of Newark's land for housing purposes and as a corollary, exclude low or moderate income housing. Therefore, it cannot be sustained and as to such lands, the zoning would be deemed arbitrary, discriminatory and confiscatory. *Kirsch Holding Co.* v. *Boro of Manasquan*, 59 N.J. 241, 251 (1971); *State* v. *Dennis Baker*, 81 N.J. 99 (1979);

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Rockhill v. *Chesterfield Tp.*, 23 N.J. 117, 126 (1957); and as said in *Bd. of Ed. of City Council, City of Glen Cove*, 29 N.Y. 2d 681; 274 N.E. 2d 749 (Ct. of Appeals 1971);

> * * * The undisputed proof in the record establishes that the city's zone classification of the land in dispute as R-1 is part of a general policy affecting all publicly held land and having no rational relation to the location or nature of the land itself.

The prime reason and purpose of West Milford in allocating all these lands to the R-4 zone was not grounded in any of the objectives of N.J.S.A. 40:55D-1 et seq. and therefore such designations are invalid. *Homebuilders League of So. Jersey* v. *VanNess*, 157 N.J.Super. 586, 596 (Law Div. 1978).

As expressed by the witness Abeles, (T. 8/21/79) there was exhibited a pattern of discrimination against the City of Newark and West Milford's ordinance precludes economic use of such property. The witness Coppola, who had assisted West Milford in the preparation of its Master Plan for the zoning ordinance in question, expressed doubts as to parts of Newark's lands being properly in the R-4 zone.

The pretrial order reserved trial as to the type of relief and damages (claimed by plaintiff) to another trial date if plaintiff was successful on the issues determined herein. Accordingly, the matter is hereby set down for further pretrial conference on Friday, April 18, 1980 at 1:30 p.m. with reference to such issues.

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In view of the foregoing, the present ordinance will be continued until a reasonable time to be specified upon completion of the said open items.

The attorney for the plaintiff shall submit a form of judgment in accordance with the Rules.

Very truly yours,

IRVING I. RUBIN, J.S.C.

IIR/ds
cc: Dolan and Dolan Esqs.